IN THE

SUPREME COURT OF THE UNITED STATES

1977-78 TERM

NO. 77-106.

RICK E. TRUDO,

Petitioner

vs

STATE OF IOWA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

PHILIP F. MILLER
900 Des Moines Bldg.
Des Moines, Iowa
50309
ATTORNEY FOR PETITIONER

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

The Petitioner, Richard E. Trudo, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Iowa entered in this proceeding April 20, 1977.

OPINION BELOW

The opinion of the Supreme court of Iowa has been published at 253 N.W. 101 (1977) and appears as appendix A.

JURISDICTION

On the 20th day of April, 1977, the Supreme Court of Iowa filed its opinion and Judgment (see Appendix A). Petitioner has filed no motion for a rehearing by the Supreme Court of Iowa, of the matters respectfully submitted herein, and has neither requested nor received an Order granting an extension of time within which to file a petition for certiorari. The jurisdiction of this court is invoked under Title 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Is it a denial of due process for the trial court to ex parte, sua sponte order consolidation for trial of charges contained in two informations against the defendant without a hearing?

Is it a denial of due process for the trial court to ex parte find a waiver by procedural default of important constitutional claims and procedural rights (to have illegally seized evidence suppressed). Simply because the motion to suppress was "untimely", absent a hearing or a showing that the defendant intentionally bypassed the local rule?

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves:

U.S. Const. amend. IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. XIV §1. All persons born or naturalyed in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. 1257 (3). Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

....(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

Petitioner was convicted in Polk County District Court, State of Iowa, of the crimes of possession of marijuana and with delivery of marijuana, both in violation of §204.401(1), of the 1975 Code of Iowa, and sentenced to imprisonment for two concurrent five-year terms. The case was appealed to the Supreme Court of Iowa, where the conviction was affirmed. State v. Trudo, 253 N.W. 2d 101 (1977).

The events leading to the trial and conviction of Richard E. Trudo are as follows:

On October 5, 1975 the Petitioner was arrested and placed under the custody of the State of Iowa.

On November 6, 1975, Petitioner was charged by seperate county attorney informations with delivery of marijuana and possession of marijuana with intent to deliver, both offenses under §204.401(1) of the Iowa Code. Both charges were set for trial on January 5, 1976. On November 12, 1975, Petitioner was arraigned and denied appointment of counsel. On November 28, 1975, Petitioner privately retained counsel. On December 8, 1975, the State of Iowa filed a "Motion to Select Trial Charge" seeking permission to try the charge of possession with intent first and the delivery charge at a later date pursuant to local Rule #6 (R. p.4, LL 28-34). This motion was not resisted by petitioner.

On December 15, 1975, the trial court denied the states' motion and ex parte, sua sponte ordered the consolidation for trial of the charges contained in the two informations filed against him, (R. p. 6, LL 27-28). On December 24, 1975 Petitioner filed a Motion to Suppress asserting, inter alia, that the arresting officers' entry on the premises was obtained through trickery and artifice and that they intentionally delayed execution of the warrant in violation of §§751.6 and 751.8, The Code, (R. pp. 7-9). On December 26, 1975, the court entered an ex parte order overruling the motion because it was "untimely," (R. p. 9 LL 25-27). District Court rule 26(F) required the motion to be filed within 17 days after arraignment. On January 5, 1976, Petitioner took exception to both rulings, (R. p. 10).

On January 5, 1976, the jury was seleted and on January 7, 1976, the jury returned a verdict of guilty on both informations. Prior to the testimony of police officer Cramer, Petitioner objected to his testimony on the grounds stated in his motion to suppress, (R. p. 12 LL 12-18). When the State rested, Petitioner renewed his motion to suppress and strike testimony on the grounds urged in his motion to suppress and the same was overruled, (R. pp. 25-26). On February 6, 1976, Petitioner was sentenced to a term not to exceed five years and on February 6, 1976 filed Notice of Appeal.

At the appellate level the defense counsel raised the issues by the assignment of error that the trial court erred in deny-

ing Petitioners pre-trial motion to suppress, ex parte, and in ordering on its own motion the consolidation of both informations, ex parte.

The Supreme Court of Iowa rejected this assigned error and affirmed the conviction.

REASONS FOR GRANTING THE WRIT

I. IN THIS CASE THE IOWA SUPREME COURT HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE, THAT A LOCAL PROCEDURAL RULE CAN BE USED TO DENY PARTIES A HEARING ON A MOTION TO SUPPRESS EVIDENCE.

II. THE IOWA SUPREME COURT HAS ALSO DECIDED A FEDERAL QUESTION: THAT IT IS NOT A DENIAL OF DUE PROCESS OF LAW FOR THE COURT TO EX PARTE, SUA SPONTE ORDER CONSOLIDATION OF CHARGES AGAINST A DEFENDANT AND TO DO SO IN THE ABSENCE OF ANY FACTUAL HEARING OR SHOWING THAT THE DEFENDANT DELIBERATELY BYPASSED SAME.

A review of the decisions of the Supreme Court of the United States indicates that the questions presented in this petition for a Writ of Certiorari have yet to be decided.

Petitioner respectfully submits that the Iowa Supreme Court committed reversible error in affirming the trial courts ruling ex parte on its own that the charges should be consolidated and in denying for "procedural default" Petitioners assertion of a federal constitutional right.

In regard to the consolidation, the Petitioner submits it was error for the court ex parte to order consolidation without notice to the state and defendant. The trial court was not in a position to ex parte fairly balance the need for consolidation as opposed to the States' Motion for a seperate trial date which was not resisted by Petitioner. §204.408 of the Iowa Code does not provide for joinder by court motion or ex parte ruling. See, §204.408; IOWA CODE, UNIFORM CONTROLLED SUBSTANCES.

Petitioner was prejudiced by the consolidation. The State was able to present evidence at the joint trial which would not have been admissible in a seperate trial. The jury may have cumulated evidence of seperate crimes. The jury may also have improperly inferred a criminal disposition and treated the inference as evidence of guilt. Petitioner was confounded and embarrassed in presenting different defenses to the different charges. Relief is warranted where there is such prejudice. Blount v. United States, 404 F.2d 1283 (D.C. Cir. 1968).

In regard to the ex parte ruling denying his motion to suppress as being untimely by a local Rule of Practice, Petitioner submits that giving effect to a local rule of practice for its own sake is "to force resort to an arid ritual of meaningless form." Henry v. Mississippi, 379 U.S. 443, 449 (1964). "A litigants procedural defaults in state proceedings do not prevent vindication of his federal rights unless the States' insistence on compliance

with its procedural rule serves a legitimate state interest." Id. at 448. "If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights." Id. Any legitimate interest of the State in avoiding delay and waste of time in the disposition of the case, by adhering ritualistically to a local rule of practice, could have been overcome by the defendant's motion to suppress renewed at the close of the state's evidence. Id.

Unless the records show that Petitioner deliberately and intentionally bypassed the local rule requiring motions to suppress to be filed 17 days after arrainment, a finding of waiver or procedural default should not be done ex parte by the trial court. Id. at 410. Although arising in a state criminal trial, the question of waiver of a federally guaranteed constitutional right is a federal question controlled by federal law. Brookhart v. Janis, 384 U.S. 1 (1966). There is a presumption against waiver of an accused's constitutional rights. Id. For a waiver to be effective, it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege. In Anderson v. Nelson, 390 U.S. 523 (1968), this court held that the late filing, by one convicted of crime in a state court, of a petition for a hearing in the highest court of the state does not constitute a deliberate by pass of state remedies or procedure, precluding him from habeas corpus relief in federal courts.

In this case, like Anderson, the late filing of the motion to suppress should not

preclude Petitioner from relief. It was not a deliberate or intentional bypass of the procedure. The record shows petitioner at arraignment was denied court appointed counsel by the same trial judge (R. p.4 ll. 1-5). The same court considered Petitioner's motion for continuance made by counsel who was retained November 28, 1975. This showed in itself that Petitioner did not have his own attorney until 16 days after arraignment. Thus, the court file itself conclusively shows an abuse of discretion by the trial court in rigidly applying the local rule to defeat a 4th Amendment claim.

The trial court should have at least set the matter of waiver by procedural default under local rule for hearing where a violation of a federal constitutional right is involved. Petitioner alleged that his "consent" was obtained by fraud and trickery and was involuntary. This matter should have been heard by the court as are questions concerning the voluntariness of confessions. A defendant in a criminal case has a constitutional right at some stage in the proceedings to object to the use of an allegedly involuntary confession and to have a fair hearing and a reliable determination on the issue of voluntariness. Jackson v. Denno, 378 U.S. 368 (1964). In Jackson, this court said that the United States Supreme Court will remand the case to District Court to allow the state a reasonable time to afford the prisoner a hearing in compliance with correct standards or a new trial failing which he is entitled to his release. This court has also held that a defendant

is entitled to a hearing on a sanity issue, the court's failure to grant a hearing, being a deprivation of defendant's constitutional right to a fair trial. Pate v. Robinson, 383 U.S. 375 (1966).

The Petitioner was prejudiced in that rules of evidence normally applicable in criminal jury trials do not operate with full force at hearings before the judge to determine the admissibility of evidence, and Petitioner was denied the opportunity to bring forth evidence at a hearing that would be inadmissible or prejudicial at trial in front of a jury. Federal Rules of Evidence rules 104(a), 1101d(1) 28 U.S.C., United States v. Matlock, 415 U.S. 164 (1974); Draper v. United States, 358 U.S. 307 (1959).

The only requirement at common law is that a motion to suppress should be filed before trial. See Jones v. United States, 362 U.S. 257 (1960). In Jones at 245, this court said in regard to a procedural rule of standing:

> As codified, the rule is not a rigid one, for under Rule 41(e) "the court in its discretion may entertain the motion (to suppress) at the trial or hearing." This qualification proves that we are dealing with carrying out and important social policy and not a narrow, finicky, procedural requirement. This underlying policy likewise precludes application of the Rule so as to compel the injustice of an

> internally inconsistent conviction.. The Government must, in any case, not permit a conviction to be obtained on the basis of possession, without the merits of a duly made motion to suppress having been considered.

See also, Senate File, IOWA CRIMINAL LAWS, 61ST General Assembly Chapter 2 §1301 Rule 10(2)(c) and Rule 11 with which the local rule in the case at bar is clearly contrary to and in conflict. Rule 10(2)(c) and Rule 11 only require that a motion to suppress be "made before trial."

In Gouled v. United States, 255 U.S. 298, 312 (1921), this court said that "Where, in the progress of a criminal trial, it becomes probable that there has been an unconstitutional seizure of papers of the accused, it is the duty of the trial court to entertain an objection to their admission in evidence against him or a motion for their exclusion, and to decide the question as then presented, even where a motion to return the papers has been denied before trial and by another judge." This further supports Petitioners' contention that local procedural defaults should not bar a partie's important and substantial constitutional rights.

All evidence obtained by searches and seizures in violation of the 4th Amendment of the Federal Constitution is, by virtue of the due process clause of the 14th Amendment, guaranteeing the right to privacy free from unreasonable state intrusion, inadmissible in a state court as it is in a federal

case. Mapp v. Ohio, 367 U.S. 643 (1961). No man is to be convicted on unconstitutional evidence. Id. This court has consistently held that a state conviction of crime must be reversed where unconstitutionally obtained evidence prejudicial to the defendant was erroneously admitted at his trial. Fahy v. Connecticut, 375 U.S. 85 (1963); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Vale v. Louisiana, 399 U.S. 30 (1970). This court has clearly showed its policy in this area by granting certiorari and reversing because a motion to suppress should have been granted at the trial. Recznik v. City of Lorain, 393 U.S. 166 (1968).

In cases involving fundamental constitutional rights, findings of state courts are by no means insulated from review by the United States Supreme Court. Ker v. California, 374 U.S. 23, (1963). The fundamental constitutional criteria established by this court must be respected by state courts. Id. The constitutional right of a defendant to be heard in his defense necessarily embodies the right to file motions and pleading essential to present claims and raise relevant issues. Holt v. Commonwealth of Virginia, 381 U.S. 131 (1965).

In sum, Petitioner contends that the trial court erred in determining ex parte important and substantial rights of this defendant absent any hearing or opportunity under due process of law to be heard by this defendant.

CONCLUSION

For thes reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Iowa.

Respectfully submitted,

Philip F. Miller

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, :
Filed April 20, 1977
Appellee :

v. :

RICK E. TRUDO, : 372/59279

Appellant :

Appeal from Polk District Court-A. B. Crouch, Judge.

Defendant appeals from convictions of possession of marijuana and delivery of marijuana, in violation of §204.401(1), The Code.--AFFIRMED.

Philip F. Miller, of Des Moines, for appellant.

Richard C. Turner, Attorney General, Richard H. Doyle, IV, Assistant Attorney General, and Ray A. Fenton, County Attorney, for appellee.

Considered en banc.

REYNOLDSON, J.

Defendant was charged by separate county attorney informations with possession of marijuana and with delivery of marijuana,

violations of §204.401(1), The Code. These charges were consolidated by court order, and upon trial defendant was convicted and sentenced to imprisonment for two concurrent five-year terms. He appeals and we affirm.

There was strong evidence in the record from which the jury could have found the following facts.

On October 5, 1975, four officers of the Des Moines M.A.N.S. (Metropolitan Area Narcotics Squad) unit went to 1424 23rd Street, Des Moines, to execute a search warrant. Defendant was in the front yard talking to a neighbor. The officers told defendant they were looking for Frank (defendant's roommate) because they wanted to buy some marijuana from him. Defendant replied Frank had moved but he could handle anything they wanted because he was Frank's supplier.

Defendant invited the undercover policemen into the house where they negotiated a purchase of one pound of marijuana for $140. Defendant admitted leaving the house to retrieve five one pound packages of marijuana from his "stash" in the bushes at the end of 24th Street. Upon his return he dumped these packages out of a green garbage bag onto the floor and told the officers to take their choice.

The policemen offered defendant two one-hundred-dollar bills. Defendant went upstairs for change, taking the remaining four bags of marijuana with him. Upon his return the money changed hands and he was

then placed under arrest.

At this point, approximately 45 minutes after the officers arrived at the premises, they executed the search warrant and searched the premises. They recovered the four one-pound bags of marijuana and also found a quantity of other material and drug related paraphernalia.

Upon this appeal defendant asserts trial court erred in consolidation of the charges for trial, overruling his motion to suppress evidence, admission of expert testimony, denial of his mistrial motions based on prosecutorial misconduct, and in the jury instructions. We consider these asserted errors in the divisions which follow.

I. Consolidation of charges.

Defendant asserts he was denied due process by trial court's ex parte, sua sponte order to consolidate for trial the charges contained in the two informations filed against him.

Defendant was charged in one information with possession of marijuana with intent to deliver and in a separate information with delivery of marijuana, both offenses under §204.401(1), The Code. Both charges were set for trial on January 5, 1976.

The State filed a "Motion to Select Trial Charge" seeking permission to try the possession charge first. This motion was not resisted by defendant. Trial court denied the motion and sua sponte ordered a "joint trial".

Defendant argues due process requires a hearing before a trial court can decide the consolidation issue. Defendant relies on language in State v. Denato, 173 N.W. 2d 576 (Iowa 1970). We note defendant, in district court, merely excepted to trial court's consolidation order. He never filed a motion for severance or requested a hearing Neither below nor here does he attempt to show how he was prejudiced by the order he attacks.

In State v. Denato, supra, we were concerned with an ex parte order directing the State to disclose the identity of an informant. The factual determination which we there held necessitated a hearing is more onerous than the consolidation question which ordinarily may be resolved by a study of minutes of testimony already before the court.

It is clear the county attorney could have combined these two charges in a single information. Section 204.408, The Code. In that event, defendant would have been required to make a motion for severance. It would have been his burden to show his interest in receiving a fair trial uninfluenced by the prejudicial effects which could result from a joint trial outweighed the State's interest in judicial economy. See Smith v. United States, 357 F.2d 486 (5 Cir. 1966).

Where, as here, the county attorney elects to file two separate informations on charges which could have been combined, we hold trial court, upon studying the informations and attached minutes of testimony, may apply the above balancing test and order the charges consolidated for trial. Of course, either the State or defendant may then file a severance motion and obtain a hearing thereon.

We adopt the procedure found in A.B.A. Standards Relating to Joinder and Severance §3.1(a), at 46-47 (Approved Draft, 1968):

> "3.1 Authority of court to act on own motion. (a) The court may order consolidation of two or more charges for trial if the offenses, and the defendants if there is more than one, could have been joined in a single charge.
> (b) ***"

See State v. Reynolds, N.W.2d, , (Iowa, filed January 19, 1977); 2 Wharton, Criminal Procedure §302, at 149-154 (12th ed. C. Torcia 1975); Annot., 59 A.L.R.2d 841 (1958); §§773.37, 773.38,773.42, The Code.

We find no trial court error with respect to the consolidation order.

II. Ruling on suppression motion.

December 24, 1975, defendant filed a motion to suppress, asserting, inter alia, the officers' entry on the premises was obtained through trickery and artifice and that they intentionally delayed execution of the warrant in violation of §§751.6 and 751.8, The Code.

Trial court entered an ex parte order overruling the motion because it was "untimely". District Court rule 26(F) required the motion to be filed within 17 days after arraignment. See Iowa Civil Liberties Union v. Critelli, 244 N.W. 2d 564 (Iowa 1976), where we held the rule was no unconstitutionally vague, it did not deny equal protection, it did not violate a defendant's statutory rights, and district judges had common-law authority to adopt it.

Nonetheless, defendant first contends trial court, rather than overruling his motion ex parte on the basis of a local procedural rule, should have granted a Jackson v. Denno type hearing on the merits. See Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Failure to provide the hearing, he argues, violated his constitutional fair trial rights.

Defendant was arraigned November 12, 1975. He retained counsel (not his present attorney) on November 28, 1975. As we have indicated, the motion to suppress filed December 24, 1975 was overruled as untimely. When trial commenced January 5, 1976, defendant "excepted" to this ruling. He unsuccessfully objected to offers of exhibits found on the premises for the same reasons asserted in his motion and renewed the motion when the State rested.

Fifth judicial district rule 26(F), mandated by criminal case congestion in Polk County, was designed to meet the speedy trial requirements of §795.2, The Code. Iowa Civil Liberties Union v. Critelli, supra, 244 N.W.

2d at 570. That enactment in turn represented a statutory implementation of the speedy-trial provisions of the federal and state constitutions. State v. Satterfield, 257 Iowa 1193, 1195, 136 N.W.2d 257, 258, (1965).

In Critelli we noted the rule's opening clause creates "an exception permitting suspension of the rule for good cause." 244 N.W.2d at 569-570. Defendant did not utilize this escape valve. He made no effort to show the court any excuse for not timely filing the motion to suppress. Under these circumstances, we hold he waived his right to hearing and to have this evidence suppressed prior to trial. The motion was properly denied.

But defendant's brief, charitably interpreted, additionally contends trial court should have sustained his trial objections to the evidence obtained in the search. The State does not raise, nor are we required to reach, the issue whether defendant may assert as grounds for objection the same grounds alleged in his untimely motion to suppress. We examine the merits of defendant's objections.

Defendant alleges entrance into the premises was gained by fraud, stealth, ruse, artifice and subterfuge. He argues the resulting search was invalid under Amendment 4, United States Constitution, citing Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921), and People v. Reeves, 61 Cal.2d 268, 38 Cal. Rptr. 1, 391 P.2d 393 (1964).

In both of those cases there was no search warrant and no reasonable grounds existed to search before the entry. The trickery involved was to gain entry for search pruposes.

Those cases are distinguishable from the situation before us. Here the officers went to the premises armed with and intending to execute a search warrant. An opportunity to "make a buy" presented itself and they pursued it. The subterfuge involved was with respect to an undercover buy. This type of artifice has been approved by our court. State v. Leonard, 243 N.W.2d 75, 80 (Iowa 1976); State v. Tomlinson, 243 N.W.2d 551, 554 (Iowa 1976) ("We have upheld the right of the State to engage in artifice and stratagem to apprehend those engaged in criminal activity").

Defendant additionally asserts the evidence seized should have been excluded because the search was not "immediate", §751.6, The Code, nor was the warrant executed "forthwith", §751.8, The Code.

That the legislature foresaw circumstances might require some flexibility is disclosed by another provision of the same chapter:

> "751.12 Return of warrant. A search warrant must by executed and returned to the magistrate who issued it within ten days after its date. After the expiration of such time the warrant, unless executed, is void."

A search warrant is issued when a proper showing is made before a magistrate that probable cause exists to believe §751.3 property is kept in or on the premises to be searched. See §751.5, The Code. Where there is delay in executing the warrant, there is a danger the situation will change so that circumstances which supported the magistrate's determination of probable cause will no longer exist.

On the other hand, most courts confronted with the statutory "forthwith" and "immediate" language have seasoned their interpretations with a dash of pragmatism. Such terms have been interpreted as requiring service within a reasonable time, depending on the facts and circumstances of each case. See, e.g., United States v. Harper, 450 F.2d 1032, 1043-1044 (5 Cir. 1971); Spinelli v. United States, 382 F.2d 871, 885 (8 Cir. 1967), rev'd. on other grounds, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969); Commonwealth v. Cromer, 313 N.E. 2d 557 (Mass. 1974).

In the case before us, the officers were delayed only 45 minutes, the time required for an unanticipated drug buy. Execution of the warrant would have destroyed that opportunity. We hold the delay was reasonable and the evidence was not subject to exclusion on this ground.

III. Prosecutorial misconduct.

Defendant asserts trial court erred in overruling two motions for mistrial.

The first motion for mistrial followed questions asked by the prosecutor concerning marijuana stems and stalks found in bedrooms of third persons during the search and the attempted introduction of this material into evidence. Trial court sustained defendant's objections to questions concerning this material and admonished the jury to disregard it.

While defendant characterizes the places this material was found as "third persons' bedrooms", at another place in his brief one of these persons is designated as a "roommate". One such person had moved from the house. There is a clear inference in the testimony defendant had control over personal property located in this person's "bedroom" and intended to move it to a new location.